No. 273

In the Supreme Court of the United States

October Term, 1968

RUSSELL SCOFIELD, LAWRENCE HANSEN, EMIL STEFANEC, and GEORGE KOZBIEL,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL UNION, UAW-AFL-CIO,

Respondents.

BRIEF AMICI CURIAE OF WISCONSIN MANUFACTURERS' ASSOCIATION AND EMPLOYERS' ASSOCIATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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INDEX

Authorities Cited

Cases

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With consent of the parties, the Wisconsin Manufacturers' Association and the Employers' Association respeetfully submit this brief as *amici curiae* in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

INTEREST OF THE AMICI CURIAE

The Wisconsin Manufacturers' Association (WMA) is a voluntary association of manufacturing enterprises with operations in Wisconsin. It was founded in 1911 and is now constituted of over 1300 member-enterprises employing over 450,000 people. This constitutes approximately 85% of all those employed in manufacturing in Wisconsin. The average number of employees per member of the association is under 100.

Since its founding, WMA has represented Wisconsin industries in obtaining equitable rail, air, mail and shipping rates, fair consideration on unemployment and workmen's compensation, taxes, wages and hours and labor-management legislation.

The Employers' Association is a voluntary association of Wisconsin business firms operating in eight (8) southeastern Wisconsin counties. It includes companies engaged in manufacturing, processing, distribution, banking, insurance, and graphic arts, as well as service organizations and institutions such as hospitals and nursing homes. It was organized in 1935, and stems from an earlier group founded in 1901. About 480 businesses comprise its present membership.

The Employers' Association is a working business organization staffed to provide services to members in the broad field of employee relations. It originates, or secures data, and offers counseling and training for self-improvement in management skills. Though not directly affiliated with other organizations, the Employers' Association works closely with various national, state and local employment groups.

The interest of the WMA and the Employers' Association in the petition *sub judice* stems not only from the natural interest provoked by reason of a question concerning the interpretation of a member's collective bargaining agreement but from their long time interest in labor-management affairs, and especially in the protection of the rights of individual employees under Section VII of the National Labor Relations Act, as amended (49 Stat. 449, 61 Stat. 136, 29 USC Section 151 *et seq.*), and the preservation of the principle of collective bargaining. The fines involved here have been the subject of many discussions, quite often with the mention of Wisconsin industry. The interest of *amici* here is to assist in righting an error in the administration of the Act which has become manifest in these long proceedings. The effect of such error, if allowed to stand, would be so far-reaching that the attendant evil will undoubtedly cause a regression in the effectiveness of the collective bargaining process and the creation of a series of acrimonious labor-management disputes for years to come.

After an extended hearing and review, the National Labor Relations Board held, member Leedom dissenting, that the fines here imposed by the Union on employees who had violated the Union's production ceiling were not violative of Section 8(b)(1)(A) of the Act. That decision is reported at 145 NLRB 1097.

Upon a petition for review to the Court of Appeals for the Seventh Circuit, that Court, Judge Knoch dissenting, denied review of the Board's findings. That decision is reported at 393 F(2d) 49.

The Petition for a Writ of Certiorari was filed July 6, 1968, presenting the question:

> Whether a Union restrains or coerces an employee in the exercise of a right guaranteed by Section 7 of the National Labor Relations Act, in violation of Section 8(b)(1)(A), of the Act, when the Union fines an employee, and attempts to collect such fine by Court action, because the employee performed work and earned wages in excess of certain production quotas established and enforced by the Union.

This brief *amici curiae* is addressed to the question and emphasizes from the objective views of industry in general, rather than the partisan views of the parties litigant, what are considered the errors in the decision below.

ARGUMENT

A. Clarification of Question.

It should be noted at the outset that the Petitioners-employees and the Respondent-NLRB fundamentally agree on the important question to be resolved by this record. However, the NLRB in its answer to the petition introduces the additional facet to the issue that the employer here had "acquiesced" in the union-established production ceilings. (Respt. Br., p. 3) This concept of the record runs through the majority opinion of the Court below and is embellished by the additional claim that the union-imposed production ceilings were "established by collective bargaining." 393 F. (2d), at 53.

The record facts disclose that through several negotiations the employer took *cognizance of the peripheral fact* that the union had imposed production ceilings which, if exceeded, a union member was required to "bank," or be subject to union discipline. From this fact, however, it cannot be said that the employer "acquiesced" in the establishment of the union production ceilings. In fact, it is undisputed that heretofore, whenever an employee chose to ignore the union-imposed production ceilings and "banking" requirements, the employer paid the employee for his *entire* production *in full.* 145 NLRB at pp. 1098, 1117. Accordingly, it can just as fairly be said that the union "acquiesced" in the violation of its by-laws by not demanding and receiving from the employer a covenant in the collective bargaining agreement to the effect that the employer would not pay employees who refused to "bank" production in excess of the union-established ceiling.

It is submitted that the reconciliation of the two conflicting fundamental policies is in no way hastened by a claim that the employer acquiesced in or jointly sponsored a rule which permitted the union to discipline its members. Elementally, the issue to be resolved is:

> Does a union violate §8(b)(1)(A) of the Act when it threatens to impose a fine upon a member for violating a union-established production ceiling where the employee seeks to take the full benefit negotiated for him in the collective bargaining agreement?

It has been repeatedly stated that the Act is not intended to regulate "the legitimate internal affairs of the union." See, *e.g., NLRB* v. *Allis Chalmers Mfg. Co.*, 388 U.S. 175. On the other hand, this black letter rule of substantive construction gives way when "overriding public interests" are involved. *NLRB* v. *Industrial Union of Marine & Shipbuilding Workers*, ... U.S. ......, 88 S.Ct. 1717.

Congress has enunciated its policy of sanctioning, fostering and protecting collective bargaining as *the method* for eliminating obstructions to the full flow of interstate commerce. Act, §1. It is submitted that this core policy must override the right of unions to manage their internal affairs if there is a conflict between the two.

B. Importance of Question Presented.

This case presents this Court with an unusual opportunity to elaborate upon, define and reconcile several conflicting, basic policies involved in the administration in the Act, thereby assisting in the furtherance of its purposes.

1. This Court held at an early date that Congress had chosen collective bargaining as the exclusive vehicle for resolution of labor-management relationships. See, *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1. Through

this process labor and management are to establish "their own charter for the ordering of industrial relations." *Local 24, Teamsters* v. *Oliver,* 358 U.S. 783. So strong was the policy of Congress, this Court held that no individually-negotiated contracts — even those in effect at the inception of the Act — could deprive employees of their guaranteed rights to collective bargaining; that collective bargaining was the *exclusive* method and all other methods must give way by reason of the announced policy of Congress. *J. I. Case Company* v. *NLRB,* 321 U.S. 332.

The decision below raises the question as to whether wages and conditions of employment shall continue to be negotiated *exclusively* under the collective bargaining process, OR whether important facets of wages and conditions of employment may now be regulated by union by-laws *in direct conflict* to the terms set forth in the bargaining agreement.

2. This Court and the various Courts of Appeal have held in a line of cases that rights and benefits negotiated for employees and solemnized in collective bargaining agreements cannot be negated by the action or inaction of either the union or the employer or the two acting in concert. Thus, an employee's negotiated seniority status cannot be waived, ignored, denied or bargained away by a union even in concert with an employer because the employee as a union member had violated union by-laws. *NLRB* v. *IBT,* 347 U.S. 17. See also, *e.g., St. Johnsbury Co., Inc.,* (1958) 120 NLRB 636; *Minneapolis Star & Tribune Co.,* (1954) 109 NLRB 727.

Similarly, this Court has held, after exhaustive review of its prior holdings to the *contra,* that employees are entitled to enforce benefits obtained for themselves under collective bargaining agreements. It has been said that to deny employees this right of enforcement "would stultify

the Congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law." *Smith* v. *Evening News Association*, 371 U.S. 195.

The decision below raises the dilemma as to whether the substance and stature of a collective bargaining agreement shall continue to give employees enforceable rights, the full negotiated benefits, and thereby further Congressional aims, OR whether employee rights under collective bargaining agreements can be effectively quashed by the collateral enforcement of a union by-law negating those rights.

3. This Court has earlier held that whether a union has a secret strike ballot or not is not a mandatory subject of bargaining, as such matter deals "only with relations between the employees and their unions"—*i.e.*, internal affairs. *NLRB* v. *Wooster Division of Borg Warner*, 356 U.S. 342. Yet, the Court below has held that the employer "can require the Union to bargain over a demand to give up its ceiling rule," 393 F.(2d), at p. 54, and at the same time held that §8(b)(1)(A) does not "encompass internal affairs of unions," *id.* at p. 52, relying upon *NLRB* v. *Allis Chalmers Mfg. Co.*, 388 U.S. 175.

Thus, this case raises the question as to whether the internal affairs of a union are to continue to remain beyond the scope of mandatory collective bargaining OR whether an employer can now insist on bargaining over the internal affairs of unions. This statement of the plain conflict of the rationale of the decision below and *Borg Warner* points out the unchartered and directionless voyage upon which unions and employers have been launched. And the utter impracticality of urging employers to commence negotiating on the internal regulation of unions is demonstrated in a case such as this where both the union "crime" and the amount of the fine is fixed by an International Union

constitution over which the bargaining agent — the local union — has virtually no power to amend. See, 145 NLRB, at p. 1116, fn. 11. If the principle of bargaining over internal union affairs remains established by the decision below, what is to prevent an employer from demanding to bargain over the amount of dues the union will be permitted to charge its employees?

4. The decision below is premised on two erroneous conclusions: that production ceilings are a "legitimate union objective," and that the by-law creating the mechanics for imposing discipline is purely an internal affair. *NLRB* v. *Industrial Union, supra,* emphasizes that §8(b)(1)(A) assures a union "freedom of self regulation where its *legitimate* internal affairs are concerned." The lower court, as did the Board, relied upon 60 years of traditional opposition to piecework and the imposition of limits by some unions for some 20 years in holding that production ceilings were "legitimate union objectives." It is respectfully submitted that while the history cannot be denied, the real question is whether some general history — much of it antedating the Congressional policy of establishing collective bargaining as the *exclusive* means of chartering relationships between management and labor — makes the establishment of production ceilings *outside* the collective bargaining agreement a legitimate objective. Is it not more consistent to say that production ceilings are directly related to wages and conditions of employment and therefore, if production ceilings are to be imposed and enforced, they *must* be incorporated into the collective bargaining agreement?

Secondly, since production ceilings are so directly related to wages and conditions of employment, they cannot be said to be the "internal affair" of a union. Not being

strictly an internal union affairs, the prohibition of §8(b)(1)(A) is not to be avoided under the facts of this case.

Allis Chalmers, supra, may quite legitimately hold that union solidarity during a strike is a "legitimate internal affair." In such a case no collective bargaining agreement is in effect. No benefit of a collective bargaining agreement is being negated by the enforcement of union discipline. No wages or conditions of employment are being affected by discouraging a break in the strike ranks by fines, for the union in such circumstances is using the strike and the solidarity of the strike legitimately to affect wages and conditions of employment. Here, the discipline is being used as *the method itself* to affect wages and conditions of employment and in absolute negation of what is established in the labor agreement.

CONCLUSION

Whether the ambit of §8(b)(1)(A) is proscribed by the internal affairs doctrine under the facts presented here is an important issue to be resolved. It is submitted that the selection by Congress of collective bargaining as the exclusive method for fixing the relationships between labor and management is a keystone policy determination. The Board and the courts have consistently and continually enhanced the stature of the offspring of this method — the collective bargaining agreement. Benefits in wages, hours and terms and conditions of employment set forth in such agreements cannot be negated by the imposition of union discipline under the guise that it is the mere management of internal affairs. Union internal regulation of its members ceases to be internal when it touches upon the major focus of the negotiation and administration of collective bargaining contracts. If union regulation of its members

affects the terms and conditions of their employment, it is no longer a legitimate regulation of purely internal affairs. Unless the decision below is reviewed and reversed in accordance with the foregoing rationale, substantial rights of employees will be negated by so-called union internal regulation. Accordingly, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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